Supreme Court, U.S.
FILED
FEB 2 2001
OFFICE OF THE CLERK

No. 105, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Third Report Of The Special Master

KANSAS' REPLY TO BRIEF FOR THE UNITED STATES

CARLA J. STOVALL
Attorney General of Kansas
JOHN W. CAMPBELL
Chief Deputy Attorney General
JOHN M. CASSIDY
Assistant Attorney General
LELAND E. ROLFS
Special Assistant Attorney General

JOHN B. DRAPER
Counsel of Record
Special Assistant Attorney General
ANDREW S. MONTGOMERY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

February 2, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

TABLE OF CONTENTS

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The United States' Position is Inconsistent with the Court's Rejection of Balancing the Equities as a Basis for Determining Prejudgment Interest	3
II. Balancing the Equities is Inconsistent with the Contract Remedy Adopted by the Court for Breach of an Interstate Water Compact	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

City of Milwaukee v. Cement Division, National Gypsum Co., 515 U.S. 189 (1995) 3

New Jersey v. New York, 523 U.S. 767 (1998)..... 4

Texas v. New Mexico, 462 U.S. 554 (1983) 4

Texas v. New Mexico, 482 U.S. 124 (1987) 3, 4, 5, 6

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 4

West Virginia v. United States, 479 U.S. 305 (1987) 3

STATUTES

Arkansas River Compact, 63 Stat. 145 (1949) .... *passim*

Pecos River Compact, 63 Stat. 159 (1949)..... 4

MISCELLANEOUS

Restatement (Second) of Contracts (1981)..... 5

Third Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig. (2000)..... 1

KANSAS' REPLY TO BRIEF FOR THE UNITED STATES

STATEMENT

The State of Kansas has filed one exception to the Third Report of the Special Master in this case ("Third Report"). That exception challenges the Special Master's recommendation that prejudgment interest not be awarded as part of damages incurred in the years 1950-1968 as a result of violations of the Arkansas River Compact by the State of Colorado. Colorado has filed four exceptions to the Third Report. Those exceptions challenge the Special Master's recommendations with regard to (1) the Eleventh Amendment, (2) the significance of the unliquidated nature of Kansas' claim in relation to prejudgment interest, (3) a balancing of the equities in relation to the amount of prejudgment interest and other damages, and (4) the Master's findings on crop losses. Both States have filed replies. In addition, the United States has filed its Brief for the United States in Opposition to the Exceptions of Kansas and Colorado ("U.S. Brief").

The United States opposes all of Colorado's exceptions except the evidentiary exception regarding crop losses, which it does not address. U.S. Brief 13-26. The United States supports inclusion of prejudgment interest in quantifying damages for breach of an interstate compact because it "is awarded not as a penalty, but as an element of compensation," and because not awarding interest in such cases could "result in an unjustified windfall for the offending State and undermine a potentially important incentive for States to comply with the

requirements of an interstate compact." U.S. Brief 26. Nevertheless, in the final three paragraphs of its brief, the United States opposes the Kansas exception, contending that the Special Master "has provided a sound basis for an award of prejudgment interest that reasonably balances the equities of each State." U.S. Brief 26-27.

The Court has allowed both States to file briefs in reply to the United States. This brief addresses only the United States' discussion relevant to the Kansas exception.

SUMMARY OF ARGUMENT

The United States' suggestion that it is appropriate to balance the equities in determining prejudgment interest is not consistent with the Court's precedents. The result of the United States' argument, if accepted by the Court, would be to deprive Kansas of an essential element of compensation for Colorado's breach of the Arkansas River Compact. Under similar circumstances, the Court has flatly rejected a balancing of equities as a means of determining an award of prejudgment interest. It would be unwise to depart from affording a complete remedy for a breach of contract in favor of an amorphous "balancing of the equities" analysis, especially in a case such as this, where one consequence would be to reduce the incentive that States otherwise have to honor their compact obligations. Moreover, to withhold prejudgment interest as the United States advocates would conflict with the Court's most recent analysis of remedies for violation of an interstate water allocation compact.

ARGUMENT

I. The United States' Position is Inconsistent with the Court's Rejection of Balancing the Equities as a Basis for Determining Prejudgment Interest.

In *West Virginia v. United States*, 479 U.S. 305 (1987), a contract enforcement suit by the United States against the State of West Virginia, the Court rejected a balancing of equities as a means of determining whether prejudgment interest should be assessed as part of the contract remedy in that case. The Court stated, "The District Court held that whether interest had to be paid depended on a *balancing of equities* between the parties; the Court of Appeals rejected such an approach, as do we." *Id.*, at 311, n. 3 (emphasis added); accord, *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189, 199 (1995) (rejecting arguments that prejudgment interest should be witheld on the ground that it would be "inequitable"). Although the United States cites *West Virginia v. United States*, U.S. Brief 21, n. 4, it offers no explanation for why a sovereign State such as Kansas should receive less compensation for a breach of contract with a State than the United States did there. The Arkansas River Compact "is, after all, a contract" between Kansas and Colorado. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The adequacy of the compensation afforded for breach of a contract with a State should not vary with the identity of the plaintiff.

II. Balancing the Equities is Inconsistent with the Contract Remedy Adopted by the Court for Breach of an Interstate Water Compact.

The Court's leading case on remedies for breach of an interstate compact is *Texas v. New Mexico*, 482 U.S. 124 (1987). There, the Court held that the Court would provide a remedy for past breaches of compact obligations. *Id.*, at 128. The Court, observing that an interstate compact is a contract, explained that a compact "remains a legal document that must be construed and *applied in accordance with its terms.*" *Ibid.* (emphasis added) (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)); accord, *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (" '[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms,' . . . no matter what the equities of the circumstances might otherwise invite") (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

Texas v. New Mexico thus confirms that the Court will not reweigh the equities that the compacting parties have balanced in adopting a compact, but that it will enforce a compact "in accordance with its terms." In that case, the Court rejected New Mexico's argument that it had acted in good faith and should therefore be relieved of its obligation to pay damages on account of its breach of the Pecos River Compact. Yet this is exactly the result that the United States urges, *i.e.*, that Colorado's good faith, its lack of knowledge or reason to know of its Compact breaches prior to 1969, should relieve it of a part of its duty to compensate Kansas. Although the Court did not explicitly reject a "balancing of the equities" approach, it effectively reached that result.

First, the Court stated firmly that it would provide a remedy "if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for." 482 U.S., at 129 (citing Restatement (Second) of Contracts § 33(2), and Comment *b* (1981)).

Second, the Court drew a distinction between what was essentially an equitable remedy dependent on a balancing of equities, on the one hand, and a legal remedy in damages, on the other hand:

> "To order making up the shortfalls by delivering more water has all the earmarks of specific performance, an equitable remedy that requires some attention to the *relative benefits and burdens* that the parties may enjoy or suffer as compared with *a legal remedy in damages.*" 482 U.S., at 131 (emphasis added).

Thus, the Court distinguished the legal remedy of damages for breach of a compact from specific performance of a compact, which would require a balancing of the equities. The implication is strong, therefore, that in providing a legal remedy in damages, like the one that Kansas seeks here, the Court intended to exclude the balancing of equities normally associated with an equitable remedy. Indeed, the Court turned aside New Mexico's plea that its good faith should outweigh Texas' right to relief for New Mexico's past failures to perform:

> "There is often a retroactive impact when courts resolve contract disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides

> they promised to do yesterday and did not. In our view, New Mexico cannot escape liability for what has been adjudicated to be past failures to perform its duties under the Compact." *Id.*, at 129.

Colorado, like New Mexico, cannot escape liability for what have been adjudicated to be past failures to perform its duties under a compact. Yet this is exactly what Colorado is demanding and what the Special Master, and now the United States, have endorsed in recommending that prejudgment interest for the period 1950-1968 be withheld.

CONCLUSION

The Kansas exception should be sustained, and the Colorado exceptions should be overruled.

Respectfully submitted,

CARLA J. STOVALL
Attorney General of Kansas
JOHN W. CAMPBELL
Senior Deputy Attorney General
JOHN M. CASSIDY
Assistant Attorney General
LELAND E. ROLFS
Special Assistant Attorney General

JOHN B. DRAPER
Counsel of Record
Special Assistant Attorney General
ANDREW S. MONTGOMERY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873